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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 309

Nina N. Anthony and Graydon Anthony, Partners, d/b/a GRAYDON ANTHONY LUMBER COMPANY,
Petitioners,

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BOYD TACKETT,
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Texarkana, Arkansas

and

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Nina N. Anthony and Graydon Anthony, Partners, d b a Graydon Anthony Lumber Company, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on April 30, 1963.

Opinions Below.

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A hereto, infra, page ....) is not yet reported. The judgment of the United States Court of Appeals is printed in Appendix C hereto, infra, page .... The findings of fact and conclusions of law of the United States District Court for the Western District of Arkansas entered November 22, 1961 (Appendix D hereto, infra, page ....) is reported at 199 F. Supp. 286. The Judgment of the United States District Court for the Western District of Arkansas filed November 22, 1961, is printed in Appendix E, infra, page .....

Jurisdiction.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 30, 1963 (infra), Appendix C, page 45.). The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented.

(1) Whether the decision of the United States Court of Appeals for the Eighth Circuit in the interpretation of the involved agreement is in conflict with the substantive law and statutes of the State of Arkansas.

(2) Whether the decision of the United States Court of Appeals for the Eighth Circuit sustains findings of fact based upon speculation and conjectors rather than substantial evidence.

Statutes Involved.

Uniform Contribution Among Joint Tortfeasor's Act, Act 315, 1941, Arkansas, Section 1, Section 2, Section 3, as amended, *Arkansas Statutes*:

Section 34-1001, "Joint Tortfeasors" defined. For the purpose of this act the term 'joint tortfeasors' means two (2) or more persons jointly or severally liable in tort for the same injury to person or property whether or not judgment has been recovered against all or some of them."

Section 34-1002, "Right of contribution—Accrual—Pro rata share.

(1) The right of contribution exists among joint tortfeasors.

(2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(3) A joint tortfeasor who enters into a settlement with the injured persons is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law."

Section 34-1003, "Individual liability of joint tortfeasor unaffected — Effect of judgment against one tortfeasor — Nothing in this act shall be construed to effect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury; but the recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasor."

Section 34-1006, "Existing rights of indemnity unaffected — This act does not impair any right of indemnity under existing law.".

Arkansas Statutes.

Section 27-1730.2, "Contributory negligence as diminishing recovery — In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of less degree than any negligence of the person, firm or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence."

Statement.

Petitioners, Nina B. Anthony and Graydon Anthony, are citizens of the State of Arkansas and are doing business as a partnership under the name of Graydon Anthony Lumber Company. This partnership has been engaged in the operation of lumber mill near Hope, Arkansas, since 1941. The Respondent is Louisiana & Arkansas Railway Company, a

Delaware Corporation with principal place of business in Shreveport, Louisiana, and has since 1941 operated a railway which transports timber and other materials from and to the Petitioners' place of business. The jurisdiction of the U. S. District Court was based upon diversity of citizenship and the amount involved.

On October 15, 1941, the Respondent Railway Company entered into an "Industry Track Agreement" with Petitioners which is set out in Appendix F hereto. After the agreement was made Petitioners constructed a planing mill building near Hope, Arkansas, and south of a 671-foot spur track which ran off the north-south main line in a westerly direction. In 1944 a sixty-foot westward extension was constructed on the spur track pursuant to a supplemental agreement between the parties and subsequent thereto Petitioners constructed a truck-loading shed just west of the planing mill building and also south of the spur track. The Trial Court found that this loading shed was constructed closer to the spur track than the minimum clearances called for in paragraph 5 of the Industry Track Agreement.

In 1956, the Respondent Railway moved the spur track about 8 inches north and away from the loading shed because some of Respondent's boxcars had been striking parts of the loading shed. On May 22, 1957, Respondent and Petitioners entered into another "Industry Track Agreement" to extend the spur track again and Respondent extended the spur track westward for a distance of 185 feet.

Respondent Railway continued to transport lumber

and other material from and to Petitioners' mill by the use of the spur track with full knowledge of the location of the loading shed in relation to the spur track. At about 10:00 P.M. in the nighttime on May 13, 1959, one of Respondent's brakemen, Herman Cloudy, was seriously injured when he fell or was knocked from a boxcar and underneath the wheels of an oncoming boxcar while the Respondent's train crew was engaged in moving out one or two boxcars which had been loaded with woodchips at a location on the spur track a car length or so west of the loading shed. Train crew members testified to having found Cloudy in his injured condition about 20 feet east of the west side of the loading shed between the south track and the loading shed.

Shortly after the accident, Cloudy stated to Respondent's claims agent that he had fallen from between two boxcars after being hit, but that he did not see how he could have been hit by the loading shed; however, the Trial Court found that Cloudy made a claim against the Respondent Railway under the Federal Employers' Liability Act and the Respondent settled his claim by payment to Cloudy of $35,700 and by payment of a hospital and medical bill of $2,018.50. Respondent also expended $1,500.00 for costs and attorney's fees in connection with the matter. Respondent then brought suit against Petitioner for the $39,218.50 so expended contending that Respondent was entitled to such full indemnity under the terms of the "Industry Track Agreement."

This case was tried before the United States District of Arkansas sitting without a jury, and Re-

spondent was awarded judgment against Petitioners for the full amount. This judgment was affirmed by the United States Court of Appeals with Judge Van Pelt dissenting.

Reasons for Granting the Writ.

I.

ARGUMENT.

The Decision of the United States Court of Appeals in the Interpretation of the Involved Agreement Is in Conflict With the Substantive Law and Statutes of the State of Arkansas.

The Trial Court held the Respondent to be "passively" negligent and the Petitioners to be "actively" negligent and adjudged that the Respondent should recover from the Petitioners the full amount of its settlement with Cloudy plus reasonable medical expenses and costs of the settlement in the total amount of $39,218.50 (R. 238-239). On appeal to the United States Court of Appeals for the Eighth Circuit, Petitioners pointed out that the substantive law and statutes of Arkansas do not recognize a distinction between "active" and "passive" negligence. The Uniform Contribution Among Joint Tortfeasors Act (Arkansas Statutes 34-1001- 34-1009) a portion of which is above set out was enacted by the Arkansas Legislature in 1941. It provides for pro rata contribution among joint tortfeasors based upon their relative degrees of fault. The *Restatement of Restitution* rules 95 and 102 referred to in the opinion of the United States District Court are inconsistent with the provisions of the Uniform Contribution Among Joint Tortfeasors Act.

The opinion of the United States Court of Appeals for the Eighth Circuit rejected the Trial Court's determination that the Respondent was "passively" negligent and that the Petitioners were "actively"

negligent. The Court of Appeals stated: "*We assume for the purpose of this Appeal that the Railroad is guilty of negligence which contributed to Cloudy's injuries*" (emphasis supplied). See Appendix A — Nevertheless, the Court of Appeals affirmed the judgment of the United States District Court holding that paragraph 5 of the Industry Track Agreement provided full indemnity in the situation here presented.

Even assuming that the evidence is sufficient to support a finding of fact that Cloudy was struck by a portion of the loading shed, the only thing which remotely connects Petitioners with such injuries is the construction of the loading shed about 15 years before the time of the injuries. On the other hand, if Cloudy was struck by the loading shed the undisputed evidence establishes that Respondent was guilty of a number of negligent acts and omissions which constituted a proximate cause of his injuries. Respondent was negligent in operating its trains on a spur track located too close to the loading shed, in maintaining its spur track too close to the loading shed, in allowing the loading shed to remain too close to the spur track, in continually using and profiting from the location of such loading shed with full knowledge of its location for a continuous period of about 15 years without protest to Petitioners, in failing to move its tracks away from the shed more than 8 inches during about 15 years of the shed's existence, in failing (as a railway carrier with special knowledge of safety problems of this type) to take the initiative in a safety program to eliminate the hazardous conditions, in failing to provide a safe place for Railway employees to work, and in other negligent

acts and omissions shown by the uncontradicted evidence.

The "Industry Track Agreement" (Appendix F) prepared by the Respondent and entered into by and between the Respondent and the Petitioners in Arkansas on October 15, 1941, provided in paragraphs 5 and 6 as follows (R. 19):

> "5. Carrier shall be saved harmless from any and all expenses and liability attendant on (1st) any readjustment required of Switch to conform to any change in grade or alignment of Carrier's tracks, or of any highway, or to meet any public need; (2nd) use of Switch being restricted or prevented by any governmental authority. Shipper shall prevent anyone, except Carrier, as well as refrain from placing or keeping any obstruction closer vertically than 25 feet to nearest rail of Switch, or closer horizontally than 8½ feet to center line of Switch. Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant, nor of Carrier's right to recover for such damages to persons or property as may result therefrom. Carrier, at any time, may lengthen, extend or connect with Switch, and may use same when not to the detriment of Shipper."

> "6. It is understood that movement of railroad locomotives involves some risk of fire, and Shipper assumes all responsibility for and agrees to indemnify Carrier against loss or damage to property of Shipper or to property upon Shipper's premises, regardless of railroad negligence, arising from fire caused by locomotives operated by Carrier on Switch, or in its vicinity for purpose of serving Shipper, except damages to premises of Carrier and to rolling stock, belonging to Carrier or to others, and to shipments in course

> of transportation. Shipper also agrees to indemnify and hold harmless Carrier from loss, damage or injury from any act or omission of Shipper. Shipper's employees or agents, to the person or property of the parties hereto and their employees and to the persons or property of any other person or corporation, while on or about Switch; and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally."

Under Arkansas law, the extent of a party's liability under a contract to indemnify another is measured by or depends upon the said party's degree of negligence. In *C & L Rural Cooperative Corporation, et al, vs. Kincaid, et al*, 256 SW 2d, 337, 221 Ark. 450 (1953), an employee of the appellee's was seriously burned as a result of coming in contact with a highly charged electric power line and recovered judgment against appellant C & L in the amount of $40,000, which judgment was affirmed by the Arkansas Supreme Court in *C & L Rural Electric Cooperative vs. McEntire*, 216 Ark. 276, 225 SW 2d 941 (1950). C & L then brought suit against Kincaid, et al, d b a Delta Construction Company, seeking to be indemnified under the terms of the agreement between the parties for the $40,000 paid to the employee of the said appellees on the said judgment. The Arkansas Supreme Court held that the appellees were liable under the contract even though the Workmen's Compensation Law protected them from suit by the employee; however, the Arkansas Supreme Court discussed the Uniform Joint Tortfeasors Act, Sec. 34-1001 to 34-1009, and said (256 SW 2d 340):

> "The present suit by appellants is based not on

tort, but an indemnity contract that C & L had with Delta (contractor), which contract, as indicated, provided:

> "The Contractor (Delta) shall hold the owner (C & L) harmless from any and all claims for injuries to persons or for damages to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part hereof.'"

The Arkansas Supreme Court then held (256 SW 2nd 341):

> "We must point out that the extent of Delta's liability to C & L on Delta's indemnity contract with C & L would be measured by, or depend upon, its degree of negligence, if any, in contributing to McEntire's injury and pro rated accordingly. The judgment is reversed and cause remanded with directions to overrule the demurrer and motion to dismiss."

The C & L case was remanded to the lower Court and came before the Arkansas Supreme Court in appeal again in *Kincade (Kincaid), et al, vs. C & L Rural Electric Cooperative Corporation, et al*, 299 SW 2d 67, 227 Ark. 321 (1957). In this last of the series of the cases dealing with this matter, the Arkansas Supreme Court approved judgment of the lower Court on a jury verdict finding that the contractor was guilty of negligence and assessing its share of the negligence and damages at 60% and the balance of the 40% of negligence and damages to C & L. The Arkansas Supreme Court approved the following instruction which the Trial Court gave the jury (299 SW 2d at page 69):

> "If you find from a preponderance of the evidence that the Defendant Delta Construction Company, or its agents or employees were negligent and that such negligence, if any, either proximately caused the injury to McEntire or contributed to cause the injury, you will answer the following question: Using 100% to represent the total or combined negligence of C & L and Delta, if you find Delta was negligent, in causing the injuries to McEntire, what percent of the negligence do you find from the evidence is attributable to each of them? In this connection you are instructed to find that C & L was negligent in some percentage, whatever the evidence may show."

It is quite clear that under the applicable Arkansas law as set forth in the C & L cases paragraph 5 of the "Industry Track Agreement" does not provide for full indemnity where the Respondent railway is guilty of negligence contributing to the injuries of its employee. Paragraph 5 of "Industry Track Agreement" here involved does not mention the word indemnity. It does not purport to be an insurance agreement, but it merely provides that the Petitioners shall not place obstructions within a certain distance of the track, and then states:

> "Carrier's knowledge of such obstructions and its continued operation on switch shall not be a waiver of this covenant; nor of Carrier's right to recover for *such damages* to persons or property *as may* result therefrom." (Emphasis supplied.)

Paragraph 6 is the only place in the Agreement where the term "indemnify" is used, and it is there provided that the shipper will indemnify the carrier

for damages to property caused by fire "regardless of railroad negligence." Paragraph 6 then provides for indemnity for loss, damage or injury from any act or omission of shipper. However, this paragraph 6 makes it quite clear that such indemnity does not apply "regardless of railroad negligence" because it specifically provides as follows:

> " . . . if any claim or liability other than from fire arise from joint or concurring negligence of both parties hereto it shall be borne by them equally."

As stated in the dissenting opinion of Judge Van Pelt, clause 5 is "a non-waiver provision only." The provisions of paragraph 5 clearly do not grant full indemnity to the negligent Respondent in the situation here presented, but in the absence of paragraph 6 and under applicable Arkansas law, paragraph 5 would indicate that the percentage of recovery by the Respondent from the Petitioners would be measured by or depend upon the degree of Respondent's negligence contributing to Cloudy's injuries. Since both the Respondent and the petitioner were determined by the Court of Appeals to be guilty of negligence contributing to Cloudy's injuries, the controlling provision of the agreement is found in that part of paragraph 6 which provides that liability from "joint or concurring negligence of both parties hereto . . . shall be borne by them equally."

Petitioners urge that under applicable Arkansas case law and statutes the only permissible interpretation of clause 5 and 6 is set out in Judge Van Pelt's dissenting opinion. See Appendix B. Some of the cases in which United States Courts of Appeal have reached the

same conclusion as Judge Van Pelt are as follows: *Colonial Stores, Inc., v. Central of Georgia Ry. Co.*, 279 F 2d 777 (5th Cir., 1960); *Foster v. Pennsylvania Railway Co.*, 201 F 2d 727 (3rd Cir., 1953). Cases cited by the majority in which United States Courts of Appeal have allowed full indemnity involved situations where the Railway had no knowledge and could not reasonably be expected to have knowledge of the existence of an obstruction within the restricted area near the track. See *Chicago R. I. & P. Ry. Co. v. Dobey Flour Mills*, 211 F 2d 785 (10th Cir., 1954); *Baltimore and Ohio Ry. Co. v. Alpha Portland Cement Co.*, 218 F 2d 207 (3rd Cir., 1955) where the Court noted that ". . . the record is wholly devoid of any evidence of prior knowledge by the Plaintiff of the unsafe condition"; *Booth-Kelley Lumber Co. v. Southern Pac. Co.*, 183 F 2d 902, 911 (9th Cir., 1950).

Arkansas rules of contract interpretation and substantive law determine the rights of the parties under this agreement. *N. P. Sloan Co. v. Barham*, 211 SW 381, 138 Ark. 350 (1919); *Crown Central Petroleum Corp. v. Speer*, 174 SW 2d 547, 206 Ark. 216 (1943). A contract must be construed strictly against the party proposing it. *Arkansas Power & Light Co. v. Murray*, 331 SW 2d 98, 231 Ark. 559 (1960). The applicable statutory and case law of the State of Arkansas was ignored by both the Trial Court and the Court of Appeals. The Uniform Contribution Among Joint Tortfeasors Act and the comparative negligence statute together with the applicable case law prevailing in Arkansas were not applied but were replaced by the Trial Court and the Court of Appeals with contrary common law rules of contribution and indemnity and active and passive negligence unknown in Arkansas law.

II.

The Decision of the United States Court of Appeals Sustains Findings of Fact Based Upon Speculation and Conjecture Rather Than Substantial Evidence.

The Petitioners strongly urge that there was not substantial evidence to support a finding that Cloudy was struck by any part of the loading shed. Such finding of fact is mere speculation as to what might have happened. There was no direct evidence regarding what caused the injuries to Cloudy and much of the circumstantial evidence is inconsistent with the speculation that Cloudy was struck by a part of the loading shed. Furthermore; in a detailed statement made about one month after his injuries, Cloudy, who was quite familiar with the spur track and the location of the loading shed, insisted to Respondent's investigator that he did not see how he could have been struck by any part of the loading shed (R. 206).

The spur track ran from east to west off of the main line. The loading shed was located south of the spur track. West of the loading shed and also south of the spur track was located the chip box. On the night of the incident the train crew coupled up two boxcars west of the loading shed near the chipbox (R. 112). Herman Cloudy did not appear at the trial to testify, but by agreement of the parties and by order of the Trial Court, statements made by Cloudy were received in evidence (R. 213). The most detailed of these statements was the one given by Cloudy to Respondent's Claim Agent, David T. Westmoreland, on June 17, 1959. In this statement Cloudy testified as follows (R. 205, 206):

"Q. Then proceed and tell what you did until the accident happened.

"A. We did a little switching in the yard. We switched out some cars for the Anthony Mill, then we went out there to do that switching and we coupled up those cars that was already in there on the engineer's side. That would be next to the shed. I got on the car, the last car, and got up on the inside, you know, between the cars to go up and let the brake off, and when I started out something struck me in the forehead up there. I either hollered, or thought I did, for the other brakeman, but he said he didn't hear me, so I don't know. But I fell on the ground. I tried to draw up, and I didn't know whether to move or not to keep from getting any more under there.

"Q. So that I can understand, you say you were on the inside ladder?

"A. Between the cars. There's a ladder on the outside, and one on the inside, and I was between the last two cars going up on top.

"Q. Was the ladder you were on on the last car, or the next to the last car?

"A. The last car. It would be on the south end.

"Q. You don't know what hit you?

"A. I don't know what hit me.

"Q. Do you think the loading shed hit you?

"A. I don't see how it could. All the rest of the time—evidently, something there did hit me, but all the times we have been working

there I've been riding on the car on that side on top, standing on the ladder. I'd be riding on the car so that the man on top following the engine could see me, and I'd ride back beyond the shed to get down, and the chute where they load chips is a little better than half a car's length beyond the shed. I'd get down and spot the car on that side. I don't know what could have struck me.

"Q. What do you think is the reason you fell?

"A. I just haven't been able to figure it out."

The train's conductor, Otis L. Matlock, Jr., testified that he found a chipped place on the first rafter on the west end of the truck-loading shed (R. 121), but he said he did not find any splinter or chip (R. 124) and that there was not any blood on the rafter or any part of the shed. On being questioned about the chip, he stated as follows (R. 124):

"Q. Well, I have been over there to look at the shed, and I am sure you have lately, haven't you?

"A. Yes, sir.

"Q. That thing is chipped all over from one end to the other?

"A. Yes, sir, I agree with you, it sure is."

The Respondent's experienced Claim Agent, David Westmoreland, visited the scene of Cloudy's injuries on the day following the incident, and again on June 16, 1959, and again in August of 1961 (R. 104). Mr. Westmoreland caused a great many pictures to be taken of the loading shed and spur track (R. 104).

The Respondent introduced twenty-five of these pictures in evidence and the Petitioners have had them reproduced in the printed record (R. 245-269). It is significant to note that not one of the twenty-five pictures show the rafter which Respondent speculates was struck by Cloudy. Respondent states on page 28 of the Record that pictures of these boxcars were taken on June 17, 1959 — one month and two days after the involved incident. These pictures must have been made by Investigator Westmoreland, taking into consideration Plaintiff's Exhibit 2-K, while any splintered rafter certainly could have been available for photographing (R. 177).

On being requested to show a picture of the rafter, the Respondent's Counsel said (R. 135): "The closest to it is the Exhibit 2K. You see that photograph don't get quite all the way to the end." No further explanation was made about why this most significant bit of evidence was never produced. Surely the experienced claim agent who was at the scene of the injury on the following day must have carefully examined, tested and photographed this alleged splintered rafter. Evidence of either a positive or negative finding of human tissue or blood on this rafter could have taken this case out of speculation, but no such evidence was produced. Also, a positive or negative statement by the physician who treated H man Cloudy about the presence of wood splinters or wood fiber in the wound on Cloudy's forehead would have gone far in removing speculation from this case.

There was considerable conflict in the testimony of the members of the train crew about the number of boxcars involved, the location of the various mem-

bers of the crew when the incident happened, and the location and relative position of the boxcar which was boarded by Brakeman Cloudy as the train moved eastward toward the main line. The Trial Court's finding that Cloudy boarded the train between the next to the last boxcar and the last boxcar is supported by the testimony of Cloudy and some of the crew members (R. 205). Cloudy testified in his detailed statement to Claim Agent Westmoreland on June 17, 1959, that he then climbed up the inside ladder on the last car to let off the brake (R. 205). In a later statement made on June 29, 1961, Cloudy said he was "climbing up the boxcar to walk on the top of one when I was struck" (R. 213). Plaintiff's Exhibit 2K (R. 255) is the only picture of the 25 introduced by Respondent which purports to show any overhang and an examination of this picture does not reveal any overhang or any other part of the loading shed which could possibly strike a man climbing up on the inside ladder.

Brakeman A. W. Carey in his self-contradictory and confused testimony stated that he climbed up on the west end of this last boxcar to let off the brake (R. 150, 151, and 152). He stated he was not near Cloudy when he was injured.

The weight of the evidence showed that the last boxcar was L&A 15055 (Plaintiff's Exhibit 9 and 9A, R. 228 and 269). Whether Cloudy climbed up the ladder on the brake end ("B") of this boxcar (Plaintiff's Exhibit 9) or the "A" end of the boxcar (Plaintiff's Exhibit 9A), and whether he was climbing up to let off the brake or to get on top of the boxcar, or both, he would necessarily have been facing

the back of the train and in a westerly direction as he climbed. This means that any part of the loading shed which might have protruded over the boxcar could only strike Cloudy on the back of his head—not his forehead—as the train moved in an easterly direction toward the main line.

It is well established that a finding of fact cannot be based upon conjecture or speculation, *Missouri Pacific Railway Co. v. Ross*, 109 SW 2d 1246, 194 Ark. 877 (1937) ". . . conjecture and speculation, however plausible, cannot be permitted to supply the place of proof." *Russell v. St. Louis Southwestern Railway Co.*, 168 SW 135, 113 Ark. 353 (1914); *Jonesboro Coca-Cola Bottling Co. v. Hambrooke*, 175 SW 2d 387, 206 Ark. 385 (1943). A finding of fact is clearly erroneous within the provisions of Rule 52 of the "Federal Rules of Civil Procedure" when it is not supported by substantial evidence. *St. Louis Trust Co. v. Finnigan* (8th Cir., 1952), 197 F 2d 565; *Freight Waves, Inc., v. Stafford* (8th Cir., 1955), 217 F 2d 831.

In the instant case the evidence not only fails to establish without speculation and conjecture that any part of the shed struck the employee, Herman Cloudy, but the fact that Cloudy's sole injury above the waist was to his forehead rather than to the back of his head shows, under the physical circumstances here presented, that he could not have been struck by any part of the loading shed.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 18, 1963.

Appendix "A"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,020.

Nina N. Anthony and Graydon Anthony, Partners, d/b/a Graydon-Anthony Lumber Company, Appellants,

v.

Louisiana & Arkansas Railway Company, Appellee.

Appeal from the United States District Court for the Western District of Arkansas.

[April 30, 1963.]

Before VOGEL and VAN OOSTERHOUT, Circuit Judges, and VAN PELT, District Judge.

PER CURIAM.

This action was brought by the Railroad to recover from the Lumber Company partners amounts paid an injured railroad brakeman, Herman Cloudy, under the Federal Employers' Liability Act. The case was tried to the court without a jury. The court found for plaintiff in an opinion reported as *Louisiana & Arkansas Ry. v. Anthony*, D.C. W.D. Ark., 199 F.Supp. 286.

The questions presented on this appeal are:

1. Were appellants guilty of negligence proximately causing Cloudy's injuries?

2. Was appellee free from negligence and if not, does appellee's negligence prevent a recovery?

3. Does the agreement of the parties called the "Industry Spur Track Agreement" require appellants to fully indemnify the railroad for the amounts expended because of Cloudy's injuries?

4. Did the trial court err in finding appellee guilty of passive negligence only and in finding appellants guilty of active negligence?

The railroad has served the Anthony Lumber Company near Hope, Arkansas, since 1941. At that time an agreement known as an "Industry" or "Spur Track Agreement" was entered into between the Railroad and the Lumber Company and a 671-foot spur track was laid by the Railroad. In 1944 a 66-foot extension was laid pursuant to a supplemental agreement, which so far as material here is like the 1941 agreement. A truck loading shed was constructed just west of the planing mill and south of the spur track at this time. In 1956 the railroad moved the spur track about eight inches to the north and away from the loading shed because some of appellee's boxcars had been striking the shed. In 1957 another "Industry Track Agreement" was entered into extending the track westward 185 feet.

On May 15, 1959, when the Railroad was moving out one or two boxcars of woodchips, at a location a

car length or so west of the loading shed, brakeman Cloudy fell from a car and received severe fractures and injuries which resulted in the amputation of his right leg above the knee joint. His claim against the Railroad under the Federal Employers' Liability Act was settled for $35,700.00 and payment of his hospital and medical bill of $2,018.50. This suit was brought to recover these amounts and for $1,500.00 attorney's fees and expenses. Judgment was for plaintiff.

The factual dispute at the trial centered around the cause of Cloudy's fall from the boxcar. In turn this dispute revolves in part around two conflicting statements given by Cloudy as to whether or not his head struck a portion of the loading shed. Cloudy did not appear as a witness. By agreement his statements were received as evidence.

The case was tried to the court without a jury. The court found for the railroad.

The errors assigned, briefly stated, are that notwithstanding the court's findings of fact and conclusions of law:

1. There is no substantial evidence that Cloudy struck any portion of the loading shed.

2. The proximate cause of Cloudy's injuries was not any negligent act or omission of the Lumber Company.

Discussed as a part of this assignment is the contention that appellee Railroad's negligence was the proximate cause.

3. The "Spur Track Agreement" does not on the facts of this case require full indemnification.

As a background for the factual discussion we need only to review briefly certain principles which have from time to time been stated by this court and which are well set forth in *Geer-Melkus Construction Co. v. United States*, 8 Cir., 302 F. 2d 181, 183, as follows:

> "Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., requires that findings of fact by the trial court 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'
>
> "Such rule is based upon sound legal principles and has been uniformly applied by the courts. We have repeatedly held that we will not attempt to substitute our judgment, based upon the cold record, for that of the trial court in determining credibility of witnesses and disputed fact issues. The responsibility for determining credibility and disputed fact issues is vested in the trial court. The trial court's fact findings can be set aside only upon clear demonstration that they were without substantial evidentiary support or induced by an erroneous view of the law. Fact findings supported by substantial evidence cannot be upset. *Transport Mfg. & Equip. Co. v. Fruehauf Trailer Co.*, 8 Cir., 295 F. 2d 223, 227; *Nelson v. Seaboard Surety Co.*, 8 Cir., 269 F. 2d 882, 886; *Pendergrass v. New York Life Ins. Co.*, 8 Cir., 181 F. 2d 136, 138.
>
> "The trier of fact, whether court or jury, is the sole judge of the credibility of witnesses and the weight to be given their testimony. Upon appeal the evidence, including such inferences as may be

reasonably drawn therefrom, is to be viewed in the light most favorable to the prevailing party. *United States v. Stoppelman*, 8 Cir., 266 F. 2d 13, 17; *Pendergrass v. New York Life Ins. Co.*, supra."

The trial court in its findings stated in part:

> "There is a factual dispute as to whether Cloudy was struck by an object at all, or whether the object, if one did strike him, was a part of one of the cars or a stationary object. There are two facts which convince the court that it was a stationary object, to-wit, the western corner of the roof line of the truck loading shed, immediately adjacent to the nearest rail of the spur track, which struck Herman Cloudy on his head, thus causing him to fall from the ladder between the cars into the path of the wheels of the last car. The first fact is that the only injury above his waist was a deep gash on the right side of his head. The second fact was that a chipped or splintered place was noted on the end rafter which supported the overhang or roof extension at the west corner of the truck loading shed."

It is this finding which appellants assigned as their first error. In addition to the evidence mentioned by the trial court, namely, the injury on the right side of his head and a chipped or splintered place on the end rafter supporting the roof overhang, we have conflicting statements of Cloudy. At first he said:

> "A. * * * I got on the car, the last car, and got up on the inside, you know, between the cars to go up and let the brake off, and when I started out something struck me in the forehead up there.
>
> * * *

Q. You don't know what hit you?

A. I don't know what hit me.

Q. Do you think the loading shed hit you?

A. I don't see how it could. * * * I don't know what could have struck me.

* * *

Q. How about the place you had to work there? For the purpose for which you were working, such as coupling the cars together, doing the work of a brakeman. Would you say it's a safe place to work?

A. Under the conditions—If you work on the other side, there's a big dump there that you were continually sliding down that dump. It was just about as safe on one side as the other. That is, if you get on the car and get out of the way of the shed.

* * *

Q. There was nothing in connection with that that had anything to do with the accident?

A. No, sir. I don't know what hit me. After I got on the car I could remember something hitting me, but I don't know what."

He later said:

"With further reference to my accident of May 15, 1959, at Hope, Arkansas, I should like to state that I do not know just what hit me across the head, and knocked me from the car, but it was some part of the shed or building just adjacent to this spur track. It just had to be some part of

that building and I believe it was the roof line just above the railroad cars, at the point where the accident took place."

"Regarding the accident I had on May 15, 1959, at Hope, Arkansas, while I was employed by the L & A Railroad Co., I fell from one of the top of the boxcars when I was struck on the head by an object and fell to the ground under the train suffering injury. The train was going about 5 mph at the time I fell. I can't recall on which side to the train I fell. I was somewhere alongside of the shed at the time I was hit. I don't know exactly where since it happened so suddenly. The boxcar I had just coupled was 20-30 feet beyond the end of the shed. I had just finished coupling the cars and I was climbing up the boxcar to walk on the top of one when I was struck. I had to climb on top since the shed was too close to the track to be on the side of the cars."

Appellants say that the evidence fails to establish without conjecture and speculation that any part of the shed hit Cloudy but rather it affirmatively shows that he was *not* struck by any part of the loading shed. This last statement follows, it is claimed, from the fact that his forehead was injured rather than the back of his head.

In *McAfee v. Felts*, 8 Cir., 295 F. 2d 716, this court had before it two statements of an injured plaintiff, a pedestrian. In one she said she saw the automobile which struck her when it was about 40 feet away and approaching the intersection where she was struck. In the other statement she said she first saw the car when about one foot away. The court said the effect of the inconsistency was "for the jury to determine and their conclusion may not be disturbed here."

We regard Cloudy's testimony as conflicting. The trial court believed that he was hit by the shed and so found. Such a finding was supported by one of Cloudy's statements and by certain physical facts pointed out by the court. Such a finding is not clearly erroneous and may not be disturbed here.

Proper consideration of the remaining issues requires setting out the material portions of the spur track agreement entered into between the appellant shipper and the appellee railroad, which are:

> "5. * * * Shipper shall prevent anyone, except Carrier, as well as refrain from placing or keeping any obstruction closer vertically than 25 feet to the nearest rail of Switch, or closer horizontally than 8½ feet to center line of Switch. Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant, nor of Carrier's right to recover for such damages to persons or property as may result therefrom.
>
> * * *
>
> "6. It is understood that movement of railroad locomotives involves some risk of fire, and Shipper assumes all responsibility for and agrees to indemnify carrier against loss or damage to property of Shipper or to property upon Shipper's premises, regardless of railroad negligence, arising from fire caused by locomotives operated by Carrier on Switch, or in its vicinity for purpose of serving Shipper, except damages to premises of Carrier and to rolling stock belonging to Carrier or to others, and to shipments in course of transportation. Shipper also agrees to indemnity and hold harmless Carrier from loss, damage or injury from any act or omission of Shipper, Ship-

per's employees or agents, to the person or property of the parties hereto and their employees and to the persons or property of any other person or corporation, while on or about Switch; and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally.

* * *

"10. Every undertaking herein shall have the effect of a covenant. * * * Either party may waive any default at any time of the other without affecting or impairing any rights arising from any subsequent default. * * *".

The trial court found that the erection of the building with which Cloudy came in contact constituted a violation of the minimum clearances which paragraph 5 of the agreement required the shipper to observe; that such building was erected subsequent to the building of the initial spur track; that it constituted an obstruction; and that such violation constituted negligence on the part of the shipper, which negligence was the proximate cause of Cloudy's injuries. Such findings are supported by substantial evidence.

The court found that the railroad was passively negligent in failing to provide Cloudy with a safe place to work. While the trial court classified the shipper's negligence as active and the railroad's negligence as passive, for reasons hereinafter set out we deem it inappropriate and unnecessary to classify the type of negligence of the respective parties. We assume for the purpose of this appeal that the railroad is guilty of negligence which contributed to Cloudy's injuries. We observe that any negligence on the part

of the railroad did not go to the extent of constituting wanton or wilful misconduct.

It is the shipper's contention that the spur track agreement affords no basis for granting the railroad indemnity for damages which are caused at least in part by the railroad's own negligence. The answer to this problem lies in the construction of the spur track agreement.

The parties agree that the contract is an Arkansas contract and that Arkansas law controls. No controlling Arkansas cases bearing directly upon our present problem have been cited or discovered. Under such circumstances, we give great weight to the views of an able and experienced trial judge upon doubtful questions of local law.

The question of the validity of the contract is not raised upon this appeal. In the trial court, shipper contended that contracts which indemnify a person against his own negligence, under circumstances here present, are contrary to public policy and void. The trial court properly rejected such contention for the reasons set out on pages 292-93 of 199 F. Supp. The issue then is whether the spur track agreement provides indemnity in the present situation. The rules governing the requisites, validity and construction of contracts generally apply to indemnity contracts. 42 C.J.S. Indemnity § 5, p. 569, states:

> "The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity, as where the terms of the contract clearly show, not an intention to in-

> demnify, but a direct promise to pay a certain sum of money or to perform a certain act. If the intention to indemnify is reasonably clear, however, it is not necessary that the contract should be drawn in any particular form of words or be expressed in technical terms. If the intention to indemnify is apparent from the whole instrument, it will be construed as a contract of indemnity, although it is called by some other name by the parties."

See annotation "Construction and effect of liability exemption or indemnity clause in spur track agreement." 20 A.L.R. 2d 711. At page 715, the annotator states:

> "Consequently, it may be stated as a general rule that an indemnity clause in a spur track agreement protects the railroad from liability for loss caused by its own negligence provided the language of the clause shows that this was the intention of the parties. * * * "

The provisions of the spur track agreements vary considerably from case to case. The phraseology used has an important bearing upon the construction of the contract including the indemnity provisions. Many cases involving spur track contracts have held that indemnity will be found which protects the railroad from losses caused in part by its own negligence where the contract construed as a whole fairly shows the intention of the parties to provide for such protection. *Seaboldt v. Pennsylvania R.R.*, 3 Cir., 290 F. 2d 296, 297-98; *Baltimore & Ohio R.R. v. Alpha Portland Cement Co.*, 3 Cir., 218 F. 2d 207, 211-13; *Chicago, R.I. & P. R. R. v. Dobry Flour Mills*, 10 Cir., 211 F. 2d 785, 788; *Minneapolis-Moline Co. v. Chicago, M., St.P. & P. R.R.*, 8 Cir., 199 F. 2d 725, 730-

31; *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 9 Cir., 183 F. 2d 902; *Deep Vein Coal Co. v. Chicago & E. I. Ry.*, 7 Cir., 71 F. 2d 963; *Buckeye Cotton Oil Co. v. Louisville & Nashville R.R.*, 6 Cir., 24 F. 2d 347; *Terminal R. Ass'n of St. Louis v. Ralston-Purina Co.*, 352 Mo. 1013, 180 S.W. 2d 693; *John P. Gorman Coal Co. v. Louisville & Nashville R.R.*, 213 Ky. 551, 281 S.W. 487.

In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, a case involving the indemnity afforded a ship owner against a stevedoring company under maritime law, the Supreme Court, holding a fact issue on indemnity was presented, stated in part:

> "Petitioner's claim for indemnity primarily rests on the contractual relationship between it and respondent. While the stevedoring contract contained no express indemnity clause, it obligated respondent 'to faithfully furnish such stevedoring services as may be required,' and to provide all necessary labor and supervision for 'the proper and efficient conduct of the work.' As this Court said in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, supra, such language constitutes 'a contractual undertaking to [perform] "with reasonable safety".' 350 U.S., at 130, and to discharge 'foreseeable damages resulting to the shipowner from the contractor's improper performance.' 350 U.S., at 129, footnote 3. Petitioner contends that a breach of this undertaking by respondent caused the injury to the longshoreman, and that petitioner's liability resulting from the breach was 'foreseeable'." 355 U.S., 565.

See also *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124; *Weyerhaeuser Steamship*

Co. v. United States, . . . U.S. . . . (decided April 1, 1963.)

Restatement, Restitution, provides:

"§ 76. General Rule.

A person who, in whole or in part, has discharged a duty which is owned by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."

§ 95. Person Responsible for a Dangerous Condition.

Where a person has became liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."

See also comments to said sections.

We now look to the facts in this case in light of the applicable law above stated. The trial court made the ultimate finding that the railroad is entitled to full indemnity. In support of this finding, the trial court states:

"There is no doubt but that the provision in paragraph No. 5 with reference to the minimum clearances has been violated by the defendant

> industry in the present case, making it liable to the plaintiff railroad, regardless of the latter's knowledge of such violations." 199 F. Supp., 298.

It is apparent that the trial court determined that the parties had contracted for indemnity against losses caused by the shipper's failure to observe his covenants as to obstructions. In our view, such construction of the contract is fully warranted. In paragraph No. 5 the appellant clearly covenants to keep the track free from obstructions for specified minimum clearances. The parties then go on to say, "Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant nor of Carrier's right to recovery for such damages to persons or property as may result therefrom." It is established beyond question that the shipper erected a building which violated the clearance covenant and that such violation was a substantial factor in producing Cloudy's injuries.

The portion of the agreement relating to non-waiver manifests an intention of the parties that knowledge of the obstruction and continued use of the switch track shall not be a waiver of the covenant. Any negligence on the part of the railroad here did not go beyond such waiver. The agreement goes on further to say that the knowledge and use of the switch track shall not be a waiver of the railroad's right to recovery for such damages as may result therefrom. We consider this a clear expression by the parties of their intent to provide complete indemnity for damages caused by violation of the obstruction covenant, and to further provide that such indemnity be operative despite the fact that the railroad con-

tinued to use the tracks with knowledge of the obstruction.

It is quite true that the intention of the parties must be gathered from an instrument as a whole. Shipper, in support of its contention that recovery should be limited to contribution, relies upon the last clause of paragraph 6, to-wit: "and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally." Immediately preceding the language just quoted is a provision in which the shipper specifically agrees to indemnify and hold the carrier harmless from any loss, damage or injury arising from any act or omission of the shipper. *This indemnity language supports and strengthens our construction of paragraph 5.* We believe that the trial court has adequately demonstrated, at pages 293 to 298 of 199 F. Supp., why the contribution clause of paragraph 6, relied upon by the shipper, cannot reasonably be construed to modify or detract from the indemnity provision of the agreement. The indemnity and contribution clauses found in *Dobry Flour Mills*, *Booth-Kelly* and the *Alpha Portland Cement* cases, supra, are almost identical to those found in paragraph 6 of the present agreement. In each of such cases, the court found the contribution clause did not wipe out or supersede the indemnity provisions.

When the contract is viewed as a whole, we do not believe that it can be fairly said that the contribution provision relied upon by the shipper is inconsistent with the indemnity provisions of the agreement. Doubtless the contribution provisions are intended to cover situations not covered by the indemnity pro-

visions, as where the injury is caused by some joint negligent act which is not specifically covered by the contract. For example, if the injury had been caused by an obstruction negligently placed near the tracks but outside the specified track clearances, the contribution provision would likely apply.

In any event, if there should be any inconsistency between the indemnity and contribution provisions in paragraph 6, we believe for reasons heretofore stated that paragraph 5 provides complete indemnity in the situation here presented. Thus, like the Seventh Circuit in *Deep Vein Coal Co.*, supra, we believe the specific provisions of paragraph 5 should prevail over the general provisions of paragraph 6.

Paragraph 10 affords little additional aid in the construction problem but does give some emphasis to the binding effect of the obligations assumed by the shipper and to the nonwaiver provisions.

Since we have held that the loss here is covered by contractual indemnity, liability is controlled by the provisions of the contract and consideration need not be given to common law standards of indemnity or contribution between joint tortfeasors. In a contractual indemnity situation, the application of theories of active and passive negligence, or primary or secondary negligence, are inappropriate. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569; *Seaboldt v. Pennsylvania R. R.*, supra; *Chicago, R.I. & P. R. R. v. Dobry Flour Mills*, supra; *Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. R.*, supra.

Shipper's claim that the Uniform Contribution

Among Joint Tortfeasors Act, adopted by Arkansas, Ark. Stats. Annot. § 34-1001 et seq., supports his position is without merit. Section 6 of the Act, Ark. Stats. Annot., § 34-1006, expressly provides: "This Act does not impair any right of indemnity under existing law."

The trial court properly held that the shipper covenanted to maintain specified minimum track clearances with respect to obstructions; that shipper violated said covenant; that shipper agreed to hold railroad harmless for any damages caused by the breach of such covenant; that injuries to Cloudy, for which payment was made by the railroad, were caused by shipper's breach of the track clearance covenant; and hence, the carrier is entitled to full indemnity.

The judgment appealed from is affirmed.

Appendix "B"

VAN PELT, District Judge (dissenting):

I disagree with the majority opinion at three points:

a) As to whether a determination as to active and passive negligence is material to the decision in this case; (Here I also disagree with the trial court's determination that the shipper's negligence was active and the railroad's negligence passive.)

b) As to whether clause 5 of the Industrial Track Agreement provides complete indemnity; and

c) As to the interpretation of clause 6 of the Industrial Track Agreement.

As above indicated, I am unable to adopt the trial court's determination that the shipper's negligence in this case was active and that of the railroad passive. This court in a case on appeal from Arkansas involving Texas substantive law set forth the clearest judicial definition of active and passive negligence that I have been able to find, when it said:

> "Passive negligence exists where one person negligently brings about a condition or an occasion and active negligence exists where another party negligently acts upon that condition and perpetrates a wrong." *Southwestern Greyhound Lines v. Crown Coach Co.*, 178 F. 2d 628 (632).

The case itself is not in point with this case but the definition is excellent. It is supported by Sec. 95 of Restatement, Restitution, referred to in the majority opinion.

I conclude that the one who brought about the condition in the instant case was the shipper who built the shed in violation of the clearance requirement and that the one who acted upon the condition was the railroad in moving cars over the track. Without the movement of the cars I conclude that Cloudy would not have been injured. The term "passive negligence" seems, therefore, more readily applicable to the shipper's acts than to the railroad's. It was so held by District Judge Bruchhausen in *Spielman v. N.Y. N.H. & Hartford Railroad Co.*, 147 F. Supp. 451, in a case as nearly in point with our case as any I have found. A dangerous condition was created by

the Trap Rock Company in erecting a post too close to the side of the railroad track. In a case brought by the injured employee, the railroad was held actively negligent. The railroad claimed over against the owner of the realty. Judge Bruchhausen stated: "Surely the Railroad's entrance upon Trap Rock's premises, over which it had a right of way, did not transform its actions into passive negligence." It is also to be observed in the instant case that the railroad after the building of the shed moved its track some eight inches to provide greater clearance and could be held to be guilty of negligence in not moving it a sufficient distance to eliminate the dangerous situation.

I conclude that both the shipper and the railroad were guilty of negligence and that their negligence concurred to produce the injury. The majority opinion assumes for the purpose of this decision that the railroad was guilty of negligence.

It is, therefore, my conclusion, to which I make reference later, that both being negligent the latter portion of clause 6 applies, to-wit:

> ". . . and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally."

Such cases as *Booth-Kelly*, cited in the majority opinion, which allow complete indemnity, do so on the basis that the railroad was guilty of passive negligence and the shipper or property owner of active negligence. I do not believe these cases have applica-

tion in the absence of a finding that the shipper or property owner was guilty of active negligence.

I disagree with the majority opinion that clause 5 in and of itself provides complete indemnity in the situation here presented. Clause 5, as I view it, is a non-waiver provision only. If it is to be construed as affording complete indemnity under every circumstance, and regardless of the negligence of the railroad, then the language just quoted from clause 6 is without application or use.

As a background for my interpretation of clause 6 I would first point out that it is basic in indemnity law

> ". . . that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms."—27 Am. Jur., Indemnity § 15.

This rule applies whether the negligence of the indemnitee is said to be the sole cause of the accident or only a concurrent cause. See 175 A.L.R. 8, 34-38.

If the railroad wants to hold shippers as insurers of loss such as that suffered in this case, I would require that it do so in more explicit language.

It was said in *Union Pacific Rd. Co. v. Bridal Veil Lumber Co.*, 9 Cir., 219 F. 2d 825:

> "This court should be and is reluctant to hold the track contract one of insurance. If that was actually intended it would have been easy to say so in unmistakable language in the contract . . .

> if the contract were spelled out as one of insurance then you might find the shippers hiring trucks instead of railroad cars." (833)

Another axiomatic rule was set forth in *Arkansas Power and Light Co. v. Murry*, Sup Ct. of Ark., 231 Ark. 559, 331 S.W. 2d 98, 100, where the court said:

> ". . . we have held many times that in case of doubt, or ambiguity, a contract or agreement shall be interpreted against the party who prepared the instrument. See *American Insurance Company v. Rowland*, 177 Ark. 875, 8 S.W. 2d 452."

Since appellee drew the agreement involved here and since it is an Arkansas contract, it should in case of doubt be interpreted against appellee.

Examining clause 6 in the light of the foregoing authorities it is to be observed as to the first sentence, which is not applicable here since it relates only to fire, that it applies "regardless of railroad negligence." No such language is used in clause 5 or is the indemnity provision in the second sentence of clause 6. It is my conclusion that if the indemnity provision of clause 6 is to apply "regardless of railroad negligence" then the agreement should have so stated by repeating in the second sentence these words which were used in the first sentence, to-wit, "regardless of railroad negligence." Likewise, if clause 5 is to be regarded as an indemnity provision the same language should have been repeated in clause 5. Reading clause 6 and observing that the first sentence applies regardless of railroad negligence and observing the omission of these words in the second sentence, it is arguable that the shipper had the right to

believe that the 100% indemnity provision did not apply "regardless of railroad negligence."

In this case both parties were negligent. Under this court's definition in *Southwestern Greyhound Lines v. Crown Coach Co.*, supra, both were either passively negligent or the railroad's negligence was active and the shipper's negligence was passive. In any event it was a joint or concurring negligence. Webster defines concurrent as "contributing to the same event or effect." It has also been defined as "operating simultaneously." The accident could not have happened without the combining of the negligence of each. I would therefore apply the above quoted portion of clause 6 relating to joint and concurring negligence and would award judgment to the railroad for 50% of the amount paid Cloudy and not for 100% as ordered by the trial court.

I recognize this as a difficult case and I do not by this dissent intend in any manner to be critical of the distinguished trial judge and my two esteemed colleagues who have reached a different conclusion.

A true copy.

Attest — Seal: ROBERT C. TUCKER,

Clerk, U. S. Court of Appeals, Eighth Circuit.

Appendix "C"

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,020.

September Term, 1962.

Nine N. Anthony and Graydon Anthony, Partners, d b a Graydon Anthony Lumber Company,

Appellants,

vs.

Louisiana & Arkansas Railway Company.

Appeal from the United States District Court for the Western District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, in accordance with majority per curiam opinion of this Court this day filed herein.

April 30, 1963.

Appendix "D"

[fol. 331] (Statement; Findings of Fact and Conclusions of Law.)

(Filed in U. S. District Court on Nov. 22, 1961.)

This is an action by the plaintiff, Louisiana & Arkansas Railway Company, a Delaware corporation, against defendants, Nina N. Anthony and Graydon Anthony, partners, d b a Graydon Anthony Lumber Company, seeking to recover the amount which it had paid in settlement of a claim asserted against it by one Herman Cloudy, under the provisions of the Federal Employers Liability Act, for which plaintiff claims the defendants are obligated to indemnify it.

The plaintiff in its complaint filed February 21, 1961, in addition to the usual allegations of corporate capacity and jurisdiction, alleged:

That on or about the 4th day of September 1941, the plaintiff and defendants entered into what is commonly referred to as an "Industry Track Agreement" for the construction of a 737-foot industrial spur to serve the defendants' lumber yard; that said contract contained provisions which fixed minimum clearances, liabilities of the parties, and indemnification of the railroad by the industry; that the same parties entered into a similar Industry Track Agreement on the 22nd day of May, 1957, by which the 737-foot industrial spur was extended an additional 185 feet.

[fol. 332] That on the 15th day of May, 1959, at approximately 10:00 p.m., one of its trains was switching and coupling cars on the said industrial spur track, and that while engaged in the operation one

Herman Cloudy, a brakeman employed by plaintiff and acting in the scope of his employment in the switching and coupling operation as such brakeman, was struck by an overhang of a shed and or pole erected by the defendants in violation of the minimum clearances set forth in the Industry Track Agreements, which caused him to fall from the car on which he was riding into the path of its wheels, resulting in serious and permanent personal injuries to Cloudy.

That said Cloudy made a claim against it for the injuries sustained by him at the time and place above alleged under the provisions of the Federal Employers Liability Act, under which the plaintiff did not have a meritorious defense, and would have been found liable to Cloudy for failure of its nondelegable duty to provide him with a safe place in which to work, even though the said Cloudy was injured as a direct result of the primary and active negligence of the defendants in violating the minimum clearance provisions of the Industry Track Agreements by erecting their loading shed and dock and allowing the same to remain in a close and dangerous proximity to the said industrial track.

That the plaintiff notified the defendants of the accident and injuries to Cloudy as well as his subsequent claim, and demanded that defendants assume liability for the payment of said claim on the ground that any negligence of plaintiff at said time and place with respect to said accident was secondary and passive in character, in that defendants' negligence in placing their loading shed in [fol. 333] close and dangerous proximity to the spur track was the primary, active

and direct cause of the accident and injuries suffered by Cloudy; that the defendants declined to accept responsibility for the handling and payment of said claim; that it entered into negotiations with Cloudy for the settlement of his claim, and that as a result of the negotiations Cloudy agreed to accept the sum of $35,700.00 in full and final settlement for such injuries. Under the terms of the settlement plaintiff also agreed to pay an additional sum of $2,018.50 due the Hempstead County Memorial Hospital for medical care rendered to Cloudy following the accident; that in addition thereto plaintiff expended approximately $1,500.00 as investigation and legal expenses in concluding the said Cloudy claim, making its expenses in connection with the handling and settlement of Cloudy's claim total $39,218.50. That at the time of concluding said settlement with said Cloudy and by agreement with defendants, plaintiff took a release from Cloudy, releasing the plaintiff and the defendants from any and all liability as a result of said accident, a true and correct copy of the release executed by Cloudy, marked Exhibit A, attached to and made a part of the complaint.

At the time of negotiating said settlement plaintiff again demanded that defendants admit their liability for said claim and pay the amounts above stated therefor, but defendants declined.

Plaintiff further alleged that the defendants were negligent in erecting their loading sheds in close and dangerous proximity to the industrial track; that defendants knew or by the exercise of ordinary care should have known [fol. 334] that the loading sheds constituted a hazard and danger to plaintiff's em-

ployees engaged in switching operations at the time and place in question; that the defendants' negligence was a direct and proximate cause of the injuries suffered by Cloudy; and that the aforementioned negligence of the defendants was active, positive and primary and without which negligence said accident would not have been exposed to litigation and liability to Cloudy. That the negligence, if any, of the plaintiff was passive, secondary and remote in character and that its liability to Cloudy for his said injuries arose solely under the provisions of the Federal Employers Liability Act; that plaintiff was not equally at fault with defendants and plaintiff is entitled to be indemnified by defendants for all loss and damages suffered by it as a result of the claim of Herman Cloudy.

The defendants, in their answer filed March 9, 1961, and in their amended answer filed September 11, 1961; admitted:

That the parties entered into the "Industry Track Agreement" of September 4, 1941, for the construction of 671 feet, rather than 737 feet of industrial track as alleged by plaintiff, and that the same parties entered into a supplement agreement during the year 1944 for the construction of an additional 66 feet of industrial track, thus making a total of 737 feet; that the 1944 agreement contained similar provisions as the agreement of 1941 between the parties; that the agreement dated May 22, 1957, which called for the construction of an additional 185 feet of industrial track contained similar provisions as the 1941 agreement with reference to clearance liability and indemnity, and served to supplement the 1941 agreement. [fol. 335] That Herman Cloudy was employed as a

brakeman by the plaintiff and was injured at the time and date alleged by the plaintiff while engaged in the course of said employment. However, the defendants deny that Cloudy was struck by a shed or overhang of the roof located or maintained by them upon or near the track.

The defendants further admitted that plaintiff notified them of the accident, injuries and resulting claim of Herman Cloudy; that the plaintiff demanded that the defendants assume liability; that they declined to accept responsibility for liability, and that the plaintiff paid the sums as alleged in the settlement of Herman Cloudy's claim.

Defendants deny that they negligently constructed and maintained a loading shed upon or near the railway right of way, or that such shed caused or contributed to the cause of injuries sustained by Herman Cloudy, and that the plaintiff and Herman Cloudy were free of negligence.

The defendants alleged to the contrary that any conditions complained of on or about the railway right of way were well known to the plaintiff and its employees, Herman Cloudy, both of whom assumed any and all liability arising from the known surrounding conditions. In this connection, the defendants alleged that the involved shed was constructed and in existence prior to the location of the involved spur track.

The defendants admitted that the 1941 and 1944 Industrial Track Agreements were in full force and effect at the time Herman Cloudy was injured. However, as a further defense they denied that the provi-

sions of either of the Industrial Track Agreements imposed liability upon de- [fol. 336] fendants for injuries sustained through the negligence of the plaintiff, and they denied that plaintiff was relieved of liability for its negligence by the terms of the contract.

The cause was tried to the court without a jury on September 20 and 21, 1961. At the conclusion of the testimony the case was submitted, and the attorneys for the parties were requested to file written briefs and arguments in support of their respective contentions. The briefs and arguments have been received and considered, along with all the testimony and exhibits thereto, and the court now makes and files herein its findings of fact and conclusions of law, separately stated.

Findings of Fact.

1.

The plaintiff, Louisiana and Arkansas Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business being in Shreveport, Louisiana.

The defendants, Nina N. and Graydon Anthony, are citizens of Arkansas and residents of Hope in Hempstead County, Arkansas, and are partners doing business under the name of Graydon Anthony Lumber Company, which has its principal place of business at Hope in Hempstead County, Arkansas.

The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

2.

The parties entered into an agreement entitled "Industrial Track Agreement" on October 15, 1941, plaintiff being referred to as carrier and the defendants being referred to as shipper, in which the carrier agreed to construct a spur track 671 feet long and to serve the shipper's [fol. 337] premises with that track. The shipper agreed to perform all necessary grading and furnish all cross ties required for construction of the track; to pay the cost of work and material to be furnished by carrier, and to pay an annual sum in advance as annual interest rental on metal materials. Inter alia, the parties further agreed as follows:

> "5. * * * Shipper shall prevent anyone, except Carrier, as well as refrain from placing or keeping any obstruction closer vertically than 25 feet to nearest rail of Switch, or closer horizontally than 8½ feet to center line of Switch. Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant, nor of Carrier's right to recover for such damages to persons or property as may result therefrom. * * *
>
> * * * * * *
>
> "6. * * * Shipper also agrees to indemnify and hold harmless Carrier from loss, damage or injury from any act or omission of Shipper, Shipper's employees or agents, to the person or property of the parties hereto and their employees and to the persons or property of any other person or corporation, while on or about Switch; and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally.
>
> * * * * * * *

"10. * * * Either party may waive any default at any time of the other without affecting or impairing any rights arising from any subsequent default. * * *"

3.

The parties entered into an agreement entitled "Supplement Agreement" during the year 1944, when the spur track was extended 66 feet to a total length of 737 feet. By the supplement agreement the parties agreed that the contract of October 15, 1941, was amended to include the extension of the said track and that said contract, as amended, shall be made the agreement between them.

[fol. 338] 4.

The parties entered into an agreement entitled "Industry Track Agreement" on May 27, 1957, by which the carrier agreed to construct a 185-foot extension to the existing spur track, the shipper agreeing to pay the costs and the increased annual interest rental, and to furnish the cross ties, ballast and grading in the same manner as set out in the previous agreements. The provisions pertaining to clearances, liability and indemnity of the parties are similar to those contained in the earlier agreements. However, the specific terms of this agreement will not be set forth herein since undisputed testimony establishes that the injury occurred on the 66-foot extension of the spur track covered by the 1941 and 1944 agreements.

5.

The parties operated under the terms of these contracts from the time the spur track was constructed to the time of the injury to Cloudy. After the con-

struction of the first 671 feet of the spur track was completed in November 1941, the defendants constructed what is referred to in the testimony as the "planing mill building," which was completed prior to 1944. As constructed, this building violated the minimum clearances called for in the 1941 agreement both horizontally by the building line and vertically by the roof line.

In the year 1944, the 66-foot extension to the spur track was completed pursuant to the contract entered into by the parties that year, and subsequent to the completion of the 66-foot extension, the defendants constructed what is referred to in the testimony as the "truck loading shed," [fol. 339] which was closer to the track than the minimum clearance called for in the agreements horizontally by a line of posts supporting the roof and vertically by the overhang or roof line itself.

In 1956 the spur track had to be "lined over," or moved over various distances from both the planing mill building and the adjoining truck loading shed due to the fact that the plaintiff carrier was using a larger size box car for loading at that time, and such box cars had been striking certain parts of the building. The track was moved over by mutual agreement.

6.

At approximately 10:00 p.m., May 15, 1959, one of the plaintiff's locomotives backed onto the spur track in order to remove a loaded car that was ready for shipment. The first coupling was made at the planing mill building where there were positioned two empty box cars. The loaded box cars and another empty

box car were positioned at a location at what is referred to in the testimony as the "chip box," the end car being Louisiana & Arkansas car No. 15055. The locomotive, which had already coupled the two cars near the planing mill building, then proceeded to couple those two cars with the two remaining cars positioned at the chip box. It was Herman Cloudy's duty as brakeman to make the coupling between these two pairs of cars. The coupling was made and the engineer received the go-ahead signal. There was no indication that anything was amiss until the engineer received a stop signal, both the go-ahead and stop signals having been made with lanterns.

The stop signal had been relayed by A. W. Carey, another brakeman who was riding at the end of the last car. Carey signaled the engineer to stop when he saw a [fol. 340] lighted lantern lying in the middle of the track over which the cars had already passed on their journey along the spur track to the main line.

The lantern of Cloudy was on the ground between the rails at a point approximately 15 feet east of the west end of the truck loading shed, and Herman Cloudy was found with his head and body between the inside rail and the truck loading shed, with his legs extending over the inside rail at a point approximately between 15 and 20 feet east of the west end of the truck loading shed. The train at the time of the injury was moving in an easterly direction at approximately 5 to 6 miles per hour, and the points at which Herman Cloudy and his lantern were found were immediately adjacent to the truck loading shed. An ambulance was sent for and Cloudy was taken to a local hospital.

Blood was found at a point 6 or 7 feet east of the west end of the truck loading shed on the inside rail nearest the shed, and there was also blood on the wheels of the plaintiff's car No. 15055, which were on the rail nearest the truck loading shed.

7.

The testimony did not clearly establish where all of the train crew were at the time of the injury, but the court finds that after Cloudy had completed his coupling of the two pairs of cars at the chip box, he had given the go-ahead signal with his lantern, climbed aboard between the third and the last car, No. 15055, on an inside ladder attached to the front end of the last car. At the time he reached the top of the ladder something struck him on the head, and the next thing that he remembered was that [fol. 341] he was on the ground, not knowing which part of his body, if any, lay across the rails in the path of the car wheels. There is a factual dispute as to whether Cloudy was struck by an object at all, or whether the object, if one did strike him, was a part of one of the cars or a stationary object. There are two facts which convince the court that it was a stationary object, to-wit, the western corner of the roof line of the truck loading shed, immediately adjacent to the nearest rail of the spur track, which struck Herman Cloudy on his head, thus causing him to fall from the ladder between the cars into the path of the wheels of the last car. The first fact is that the only injury above his waist was a deep gash on the right side of his head. The second fact was that a chipped or splintered place was noted on the end rafter which supported the overhang or roof extension at the west corner of the truck loading shed.

8.

Herman Cloudy made claim against the plaintiff to recover damages for his injuries under the Federal Employers Liability Act, Chapter 2, Title 45, U. S. C. A., Sec. 51, et seq. The plaintiff gave notice thereof to defendant with tender of defense and demand that such defense be undertaken by defendants because it was its position that the injuries and damages were approximately caused by the acts and/or omissions of defendants, and that such acts and omissions were a breach of the agreements mentioned. The tender was declined. The plaintiff then proceeded to make a reasonable settlement with Herman Cloudy by payment of the sum of $35,700.00. The hospital bill was $2,018.50, and the expenditures for costs and attorneys' fees amounted to $1,500.00 more, making a total expenditure of $39,218.50.

[fol. 342] Discussion.

The issues in this case revolve about the terms of the 1941 agreement entered into by the parties which govern the 1941 construction of the spur track and its 1944 extension. The first of these issues concerns the acceptance of the indemnity contracts as consistent with public policy in general and specifically in Arkansas. The second question is concerned with the applicability of the provisions, heretofore set out in the quoted paragraphs 5, 6 and 10 of the agreement, to the facts in this case. The third issue to be decided, depending on which provisions apply to this case, goes to the question of whether it was active or passive negligence on the part of either the carrier or the industry, and whether the plaintiff had waived the provisions of the contract and is estopped to rely upon

the contract in support of its claim and for the recovery of the full amount claimed.

So far as the first issue is concerned, the general rule is that spur track agreements which indemnify the carrier are not contrary to public policy. In 44 Am. Jur., Railroads, Sec. 235 (Supp. 1961), there appears a comprehensive explanation and rationale of such contracts, starting at page 30 (Supp. 1961), as follows:

> "Page 455. Add new paragraph at end of section: Contracts under which a railroad company constructs industrial switches, spurs or sidetracks, to serve industrial plants situated on property owned by others, frequently provide that the railroad is exempted from, or will be indemnified for, loss to persons or property connected with the industry or business to be served by such spur track. The service afforded the shipper by such additional facilities for the special handling of his freight is not normally required of the railroad under its duties to the public as a carrier, and it may attach such conditions as it sees fit in giving its consent to furnish the particular service. On this theory, stipulations in such contracts exempting the railroad from liability for the destruction of property belonging to the party with whom the contract is made are held not to be contrary to public policy.
>
> [fol. 243] "The judicial interpretation of the indemnity clause is a spur track agreement obviously depends primarily upon the exact wording of the clause involved, the language of which varies greatly in the various cases; it also depends upon the particular circumstances under which the loss was occasioned. Hence, no generalization of the principles impelling the courts to the actual deci-

sions reached is possible or permissible beyond the broad statement that the general rules applicable to the construction of contracts generally, are fully applicable to this type of agreement. Against this background it may be generally stated that the indemnity clause will be construed as protecting the railroad from liability for loss caused by its own negligence, if the language of the contract indicates that this was the intention of the parties, but not from liability for loss caused by its wilful or wanton acts, and that the applicability of the clause does not depend on the existence of negligence on the part of industry.

"Where the liability clause is followed by a specific provision to the effect that in case of joint or concurring negligence of the parties liability should be shared by them, courts will construe the two provisions so as to give effect to both of them.

* * * * * * *

"* * * However, it is well settled that the liability clause does not cover payments made voluntarily by the railroad and without legal obligations."

This general rule was approved in Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. Co., 199 F. 2d 725 (8 Cir., 1952), in which the court stated at page 729:

"This contract is broad enough to exempt the Railroad Company from the result of its own negligence. As the contract was not executed by the Railroad Company in its capacity as a common carrier, but as the owner of property, such a contract contravenes no public policy of the State of Minnesota (citing cases).

* * * * * * *

In Northern Pacific Ry. Co. v. Thornton Bros. Co., supra [206 Minn. 1932, 288 N.W. 228], the Supreme Court of Minnesota, in the course of its opinion, said:

"'Neither law nor public policy prevents the ordinary contractor from buying from a third party indemnity from the pecuniary result of his own negligence. That is legitimate as insurance. How does the same process, with identical result, become illicit simply because they are those of the original and basic contract rather than a collateral one for conventional insurance?'"

[fol. 344] The case at bar apparently is one of first impression in Arkansas to the extent that a railroad is seeking indemnification from a shipper for injuries to a third person pursuant to a spur track agreement. Indemnification contracts appear to be generally accepted in Arkansas, for in Carter v. Adamson, 21 Ark. 288 (1860), the Arkansas Supreme Court construed the terms of an indemnity contract in general with no question as to the validity of that type of contract.

So far as spur track agreements are concerned, the only occasion that the Arkansas Supreme Court had to pass on such a contract was in Mo. Pac. R. R. Co., Thompson, Trustee, v. Ross, 211 Ark. 784, 202 S.W. 2d 365 (1945), and in this case the court only held that the railroad could not contract against its negligence to the exclusion of rights accruing in favor of third parties. This case did involve a contract similar to the one in the present case, and at the time the railroad had not brought action against the shipper for indemnification. Also, at the time of the accident the railroad was extending the line for its own purposes and not for those of the shipper.

The second issue is more complex in that it presents the question of the interpretation of paragraphs Nos. 5 and 6 of the agreement in the present case, as they pertain to the rights and liabilities of the carrier and the industry where both have been negligent to some degree in causing injury to a third person.

The most comprehensive discussion of this type of contract in a recent case appears in Booth-Kelly Lbr. Co. v. So. Pac. R. Co., 183 F. 2d 902 (9 Cir. 1950). In that case [fol. 345] a trainman, while riding on one of plaintiff's freight cars in line of duty, was struck and injured by a wood cart left near the tracks by an employee of the defendant in violation of the spur track agreement. Paragraph 7 of the contract in the Booth-Kelly case is similar to paragraph 6 of the contract in the present case, and in footnotes 2 and 3 on page 907 it is said:

> "This part of the paragraph reads: 'Industry also agrees to indemnify and hold harmless Railroad for loss, damage, injury or death from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said Track; * * * and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.' "

In dealing with this similar fact situation and these similarly worded clauses, the court in the Booth-Kelly case goes into a lengthy and detailed discussion as to the weight to be given the clauses in light of the pre-existing common law rules and the applicability of each clause to the fact situation. Beginning at page

907 the court states:

"This brings us to a consideration of the meaning of paragraph 7. If it contained only that part of the above quoted paragraph down to the semicolon, it would have appeared unquestionably sufficient to require complete indemnity. It is the remainder of this paragraph which the court deemed controlling 'since the railroad was in some measure also at fault.'

"Basic in any determination of the meaning of this whole paragraph is an understanding that when the parties contemplated that there might be claims for indemnity they must have been cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered from him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution, as follows: 'In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable * * *.

[fol. 346] " 'The fact that the payor knew of the existence of the dangerous condition is not of itself sufficient to bar him from restitution. In many cases it is only because he had knowledge of the condition that he is liable to the person harmed.'

"If we were to assume that the existence of any negligence on the part of Southern Pacific, without regard to whether it be active or passive, primary or contributory, necessarily threw the case within the last portion of the paragraph (note [2], supra), then one might fairly ask what

sort of case must have been contemplated when the parties drew the first portion. (note 2, supra), if, as pointed out in the comment quoted, in most cases the liability for which indemnity is sought can arise only because the person claiming indemnity was himself guilty of some negligence?

"In approaching a determination of the meaning of this whole paragraph, it appears to us, initially, that each part of the paragraph was intended to cover certain kinds or types of cases, and that each part refers to a situation different from that contemplated ~~by~~ the other. And in view of the fact that in most cases where demand for indemnity arises, the claimed indemnitee must have been found liable by reason of some negligence, we think it extremely unlikely that all such case were intended to be excluded from the operation of the first portion of the paragraph. Otherwise, this portion of the paragraph would have little or no application to any actual case.

"Among the circumstances surrounding the execution of the contract was the state of the common law, and the definition of the common law obligations under which the parties would have been required to function had no such contract been executed. It is fair to assume that the parties had these rules in mind as they considered to what extent they would alter or reaffirm those obligations by their writing.

"The common law rules relating to indemnity and contribution as between parties who have been guilty of breaches of duty under circumstances resembling those here involved are expounded in a great number of decided cases, in Oregon and elsewhere. * * *

* * * * * *

"The rules which these three cases, Washington Gas Co., Union Stockyards, and Astoria [considered above], exemplify, have received approval in many cases, the effect of which has been summarized in the Restatement of the Law of Restitution. The ordinary rule denying indemnity or contribution to a joint tort-feasor, is stated in section 102 as follows:

"'Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other.'

[fol. 347] "The rule enforced in the Washington Gas Co. and the Astoria cases is stated in section 95 as follows:

"'Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it is the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.'

"When viewed against the background of these accepted and well-known common law rules, which we think the parties must have had in mind, the separate portions of paragraph 7 of the contract appear to be directed to cover the two types of cases covered by these rules. We think that the first portion of the language here to be construed (note 2, supra), was intended to

cover a case of the kind dealt with in the Washington Gas Co. and the Astoria[5] cases, and in section 95, supra. And we think that the portion following the semicolon (note 3, supra) was intended to provide for contribution in such cases as those represented by the Union Stockyards case, and section 102, supra.

"An important factor in bringing us to this view is our belief that the parties would not have intended that Southern Pacific's rights to indemnity, which it might have claimed in the absence of such a paragraph, were to be trimmed down, or in any manner diminished. On the other hand, as the trial judge said in his opinion, speaking of Booth-Kelly, it was a fact 'that its interests were served by the making of this contract.' We think it was intended, and effectually stated in the contract, that in a case of the kind described in Restatement, section 95, Southern Pacific should have the right to full indemnity, while in a case of the section 102 kind, Southern Pacific should have the right, created by the contract, to contribution to the extent of one-half the damages.

* * * * * * *

"* * * Southern Pacific was held liable because of its 'negligent failure to make safe a dangerous condition of lands or chattels, which was created by the misconduct of the other,' i.e., of Booth-Kelly. That this is the type of case which the compilers of section 95 had in mind is made clear by their comment on the section. The court's finding that defendant's negligence was the 'active, direct, proximate and primary' cause, negatives the existence of the acquiescence mentioned in the later portion of the comment."

[fol. 348] In other words, the court construed the first sentence of the indemnity agreement as covering

the situation where the railroad became liable to a third person because of its negligent failure to make safe a dangerous condition created by the misconduct of the industry, while it is construed the second sentence of the indemnity agreement as referring to the situation where the industry and the railroad, acting independently or jointly, negligently injured a third person. In concluding that the injury involved in the Booth-Kelly case was one of the type covered by the first sentence, the court pointed out that the above distinction between the two sentences must have been intended by the parties, since otherwise the first sentence would have hardly any application at all.

Or, as stated more succinctly in Union Pacific R. Co. v. Bridal Veil Lumber Co., 219 F. 2d 825 (9 Cir. 1955), the discussion in the Booth case was summed up as follows at page 833:

> "'In sum, in this court's view the entire clause of the track contract enunciates the common law on indemnity and contribution except where the parties are in pari delicto under Section 95, Restatement of Law of Restitution; then they divide the loss equally.'"

In Deep Vein Coal Co. v. Chicago & E. I. Ry. Co., 71 F. 2d 963 (7 Cir. 1934), the railroad's trainman in discharge of his duty came in contact with a pole installed by the defendant shipper at a location in violation of its spur track agreement with the plaintiff railroad. This agreement had similar clauses to those set out in the present contract. However, there was a slight difference in the wording in paragraph 10 of the contract in the Deep Vein case which corresponded with the quoted part of paragraph 5 in the instant case in that paragraph 10 contained no speci-

fications as to the clearance in feet when indemnification was promised for injuries arising [fol. 349] by reason of such violation to the extent that it was in "dangerous proximity" to said tracks. Paragraph 8 of the contract in the Deep Vein case substantially corresponded to paragraph 6 of the agreement in the instant case.

In deciding the amount recoverable by the railroad the court made the following statement, beginning at page 964:

> "The question must be decided under the terms of the contract. If paragraph 10 applies, appellees were entitled to recover; but, if paragraph 8 governs, appellees cannot prevail. The paragraphs are mutually exclusive.
>
> "Appellant contends that the negligence causing the injury was the joint or concurring negligence of the coal company and the railway, in that the former set its pole dangerously near the switch track, while the latter negligently suffered its track to remain in dangerous proximity to the pole, and negligently sent its employee into this dangerous place to work.
>
> "It seems to us that the joint or concurring negligence covered by paragraph 8 is not the negligence of the one party consequent upon the primary negligence of the other. But, be that as it may, paragraph 10 definitely and specifically covers such a case as this. The paragraph defines the rights of the parties where a liability accrues to the railway by reason of the coal company's placing any structure in dangerous proximity to the track. Paragraph 8 is general. Instances may be readily conceived where an injury is the result of the concurring negligence of the two. Such

would in general be covered by paragraph 8. But this particular instance of loss to the railway resulting from the coal company's placing of its structure in dangerous proximity to the track is specifically covered by paragraph 10, which specifies that in such case the coal company will protect, indemnify, and save harmless the railway against loss. The very specific paragraph 10, whenever it applies, excludes the application of the general paragraph 8.

"The coal company did erect its pole in such dangerous proximity to the track, and under paragraph 10 must hold the railway harmless against its entire consequential loss."

In Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. Co., supra, in which there was a similar fact situation, the pertinent part of the agreement in question was stated by the court as follows at page 728:

[fol. 350] "By the sixth paragraph of this contract appellee covenanted and agreed that it would not erect, construct, have or suffer any part of any building, structure, appurtenance or appliance, or any other obstacle or projection, at a less distance than six feet laterally at right angles from the nearest rails of such spur or switching tracks.' Then follows the indemnity agreement by which the Moline Company agreed to save the Railroad Company harmless from and against any and all damages, remote as well as proximate, in any wise resulting from any non-performance or non-observance of the foregoing covenant concerning lateral distance from which the Railroad Company might become in whole or in part liable. It is then provided that,

'Neither the Railway Company's knowledge or notice of any such non-performance or non-

observance, nor its failure to notify its own employees thereof, nor its continued operation of said spur tracks, shall be in any wise deemed a waiver of the foregoing covenant of indemnity.' "

In discussing the applicability of the clauses of that particular agreement to the similar fact situation, the court stated as follows beginning on page 731:

"It is urged that the injuries suffered by plaintiff were not the proximate result of the negligence of the Moline Company in placing this trash box within six feet of the railway tracks. The Railroad Company's cause of action against the Moline Company, however, is not primarily based upon tort, nor is it dependent upon negligence. The liability of the Moline Company arises from its breach of this indemnity provision of the contract. The rule as to proximate cause is not available to the Moline Company because by its contract it agreed to indemnify against loss 'from and against any and all damages, remote as well as proximate, in any wise resulting from any non-performance or non-observance of the foregoing covenant concerning lateral distance or perpendicular height, for which the Railway Company shall become, **in whole or in part**, liable or be charged.' * * * It thus appears that the damages from which the appellant agreed to hold the Railroad Company harmless need not have been caused solely by any negligence on its part, nor was the act of the Moline Company required to be the proximate cause of the loss. A liability resulted even though such act were the remote cause.

* * * * * *

"* * * In so placing this obstacle, the Moline Company was as a matter of law negligent, but whether or not negligent in so doing, it violated this provision of the indemnity agreement. Neith-

> er is there any force in the argument that the contract provisions [fol. 351] are not applicable because certain employees of the Railroad Company knew of the presence of the trash box and notwithstanding that knowledge it undertook to pass the cars along the track. The contract, however, specifically provides that neither knowledge nor notice of any non-performance or non-observance of the contract by Moline Company 'shall in any wise constitute a waiver of the covenant of indemnity.' The trash box was, when empty, placed within three or four feet of the track by employees of the Moline Company. This violated the clearance provision of the contract and was at least a remote cause of plaintiff's injuries."

There is no doubt but that the provision in paragraph No. 5 with reference to the minimum clearances has been violated by the defendant industry in the present case, making it liable to the plaintiff railroad, regardless of the latter's knowledge of such violations.

Therefore, in light of the rules of law and the discussions in the above mentioned cases it would appear that the next question to be decided in this case is whether the actions of the plaintiff railroad are such that would entitle it to recover 50 per cent by virtue of concurring active negligence on its part under the second provision of paragraph 6, or whether it may recover 100 percent by virtue of having been passively negligent only under the first provision of paragraph 6.

The plaintiff contends that its negligence arising from its failure of a nondelegable duty to provide a safe place to work under the provisions of the F.E.L.A. is vicarious only, and as such is passive; and that the

negligence of the defendants by building the truck loading shed in violation of the terms of the spur track agreement, which negligence was imputed to the plaintiff under the F.E.L.A., was active negligence.

On the other hand, defendants contend that if negligent at all under the terms of the agreement, they were guilty of passive negligence only in constructing the truck [fol. 352] loading shed and by allowing it to remain in dangerous proximity to the spur track; and that the moving of freight cars over the spur track by the plaintiff with notice of the dangerous condition constituted active negligence.

Thus the contentions of the parties in light of the admitted negligence of the railroad's having breached a statutory duty, and the negligence of the industry by a breach of a contractual duty, narrow the question to this consideration: Were both parties actively negligent; or, if only one was actively negligent, which one?

The rules of law which govern the determination of the question are as follows:

(1) The railway company can be guilty of passive negligence and therefore liable to the claimant under its nondelegable duties as set forth in the F.E.L.A. and still recover full indemnity from the industry. Booth-Kelly Lumber Co. v. Southern Pacific Co., supra.

(2) The question of liability of the industry in such cases is to be determined from the indemnity contract and the parties' negligence is to be determined on the basis of the F.E.L.A., 45 U.S.C.A.,

Sec. 51, et seq., not common law negligence. Booth-Kelly Lumber Co. v. Southern Pacific Co., supra; Chicago, R. I. & P. Ry. Co. v. Dobry Flour Mills, 211 F. 2d 785 (10 Cir. 1954); Wanser v. Long Island Ry. Co., 238 F. 2d 467 (2 Cir. 1956).

(3) If it is determined that both the railway and the industry were negligent under the terms of the F.E.L.A., then the railway can recover full indemnity if its negligence is deemed to be passive while the industry's negli- [fol. 353] gence is deemed to be active, but if the negligence of both the railway and the industry is deemed to be active, then the railway and the industry is deemed to be active; then the railway can only recover one-half. Booth-Kelly Lumber Co. v. Southern Pacific Co., supra; Wanser v. Long Island Ry. Co., supra; Gollick v. New York Central Ry. Co., 138 F. Supp. 384 (D. C. Mich. 1956); B. & O. Ry. Co. v. Alpha Portland Cement Co., 218 F. 2d 207 (3 Cir. 1955).

When the contract under which plaintiff is seeking indemnity is considered in this light, it is the court's opinion that plaintiff violated none of the provisions of the contract by switching and coupling its freight cars on the spur track under the existing conditions, but that the defendant industry's violation of its provisions constituted negligence which was the active, direct, proximate and primary cause of the injury to plaintiff's employee, Herman Cloudy. This characterizes the case as coming under the first provision of paragraph 6, quoted above, which grants full indemnity rather than the contribution allowed by the second provision in the same paragraph. By this the court construes "act or omission," referred to in the

first provision of the above mentioned paragraph 6, to mean the wrongful or negligent acts by the defendants which would create statutory liability on the part of the railroad under the F.E.L.A. This is a case, then, in which the defendant industry was actively negligent in creating and not correcting the unsafe condition adjoining the spur track which caused the accident, while the plaintiff's only negligence consisted of the defendants' negligence vicariously imputed to it by virtue of its nondelegable duty to its employee, Cloudy, to provide him with a safe place to work.

[fol. 354] The final issue is whether notice to the plaintiff and its acquiescence in the existing conditions amounted to waiver or estoppel on its part such as to bar its recovery.

All parties concerned knew of the dangerous proximity of the truck loading shed to the spur track. Defendants built the shed after the track had been laid. Plaintiff then had the track moved over to allow the passage of larger box cars, and Cloudy himself knew from his own personal experience, as well as having been notified by a warning sign placed by the plaintiff at the entrance of the spur track onto the premises of the defendant, which read as follows: "These buildings will not clear a man on top or side of car."

This question arose in New York Central R. R. Co. v. General Motors Corp., 182 F. Supp. 273 (D.C.N.D. Ohio 1960), where there was an absence of a specific waiver provision, in which the court made the following statement beginning at page 289:

"Even if plaintiff should have known of the underframe storage, its duty in this respect could have been no greater than that of defendant which had more opportunity for knowledge.

"'It is well settled that, where both parties have the same information, or the same means for ascertaining the truth, there can be no estoppel.' Commercial Inv. Trust v. Bay City Bank, 6 Cir., 1933, 62 F. 2d 735, 736.

* * * * * * *

"At this point it seems appropriate to discuss and decide the contention of the defendant that, 'the railroad consented to the storage of underframes upon the track.' As the defendant's brief on the subject clearly reveals, it is difficult to separate the contention of equitable estoppel and this contention as to the railroad's consent. In the fourth paragraph on page 23 of defendant's brief I find the following sentence: 'Having consented to it and allowed it (underframe storage, etc.), the railroad cannot now be heard to complain about it.' In analyzing this sentence, the so-called consenting and allowing by the railroad are based upon the observations made by the plaintiff's train crewmen and the silence on the part of the plaintiff regarding the manufacturing procedures [fol. 355] being conducted by the defendant on Tract A' B'. On this point I have specifically found that the railroad had no knowledge of the manufacturing procedures of the defendant or of the defendant's placing underframes on Tract A' B' at column C-10, and that the train crewmen's observations are not imputable to the plaintiff to convey notice and knowledge as contemplated in the Sidetrack Agreement.

* * * * * *

"* * * By a mere reading of the exhibits, which reflect the cautiousness and extent of their negotiations, it is proper to conclude that the parties fully understood and comprehended the terms and language of the Agreement and that they intended that any modification or amendment thereof would be initiated and consummated in much the same manner as was the execution of the Agreement, and under no circumstances did the parties contemplate or intend that a modification or amendment, could or would be initiated or effected by a laborer, such as the train crewmen of the plaintiff or the welders and hookers employed by the defendant. Consistent with the foregoing conclusion, I further conclude that the evidence failed to establish that the plaintiff consented to the placing of underframes upon Tract A' B'."

However, the agreement in the present case has settled the question of waiver on the part of the plaintiff, see paragraphs Nos. 5 and 10 quoted in part above, and this court is not in a position to alter the terms of the agreement especially where these terms are as specific as they are in the present agreement.

That such provisions as to waiver are not void as against public policy has been decided by Minneapolis-Moline Co. v. Chi., M., St. P. & P. R. Co., supra.

[fol. 356] Conclusions of Law.

1.

The court has jurisdiction of the parties to and the subject matter of the action. Title 28, U.S.C.A., Sec. 1332 (Supp. 1960).

2.

Indemnity provisions of spur track agreements are not void as against public policy.

3.

The plaintiff was passively negligent in failing to provide a safe place to work for its employee, Herman Cloudy. Title 45, F.E.L.A., Sec. 51, et seq.

4.

The defendants were actively negligent in violating the terms of the 1941 track agreement which negligence was the direct and proximate cause of Cloudy's injury.

5.

Plaintiff is entitled to indemnity by the defendants for the full amount of its settlement with Cloudy, plus the full amount of reasonable medical expenses and costs of the settlement.

Judgment for the plaintiff should be entered in according with the above for $39,218.50, with interest at 6 percent from date, together with costs.

This 22nd day of November, 1961.

JOHN E. MILLER,
United States District Judge.

Appendix "E"

[fol. 357] (Judgment of U. S. District Court.)

(Filed in U. S. District Court on Nov. 22, 1961.)

In the United States District Court,

Western District of Arkansas,

Texarkana Division.

Louisiana & Arkansas Railway Company, Plaintiff,

v. Civil Action No. 786.

Nina N. Anthony and Graydon Anthony, Partners, d b a Graydon Anthony Lumber Company, Defendants.

On September 20 and 21, 1961, this cause was tried to the court, without the intervention of a jury, the plaintiff appearing by Messrs. P. H. Hardin and Bradley D. Jesson, its attorneys, and the defendants appearing by Mr. Boyd Tackett, their attorney. Evidence on behalf of the parties was presented and the case was subsequently submitted in accordance with order entered herein on October 2, 1961.

Now, having considered all of the pleadings herein, the evidence adduced at the trial of this cause, the depositions, statements and exhibits, and the briefs of the parties heretofore submitted, the court has prepared and filed herein its Findings of Fact and Conclusions of Law, separately stated, and in accordance therewith,

It Is Ordered and Adjudged that the plaintiff, Louisiana & Arkansas Railway Company, have and

recover of and from the defendants, Nina N. Anthony and Graydon Anthony, Partners, d b a Graydon Anthony Lumber Company, the sum of $39,218.50, with interest at the rate of six per cent per annum from this date until paid, together with all of its costs herein expended.

This November 22, 1961.

JNO. E. MILLER,
United States District Judge.

Appendix "F"

LOUISIANA & ARKANSAS
RAILWAY COMPANY

INDUSTRY TRACK AGREEMENT

THIS AGREEMENT, executed in triplicate, this 15th day of October, 1941, by and between LOUISIANA & ARKANSAS RAILWAY COMPANY, a Delaware corporation (Hereinafter called CARRIER), Party of the First Part, and J. W. and GRAYDON ANTHONY, of Hope, Arkansas, Partners, doing business as GRAYDON ANTHONY LUMBER COMPANY to be addressed at Hope, Arkansas (hereinafter called SHIPPER), Party of the Second Part, WITNESSETH:

1. Carrier agrees to serve Shipper's premises with one certain proposed spur track, including appurtenances (hereinafter called Switch), approximately 671 feet long, breaking out of Carrier's main line at Mile Post 2.538, Hempstead County, State of Arkansas, the

approximate location of Switch being shown in yellow color on blue print map dated September 4th, 1941, attached hereto and made a part hereof. "Switch" also embraces (except as regards apportionment of cost and ownership) any future additions to or extensions of Switch.

2. Carrier at the work, and as agent and at cost of Shipper, shall construct switch, except that Shipper will perform all necessary grading and furnish all cross ties required for construction of switch.

Shipper shall pay to Carrier annually, in advance, $52.00 interest rental on metal materials, provided before Carrier need start any work Shipper shall furnish (and thereafter keep in effect) such right-of-way, releases of damage to property and franchises over or along roads, streets and alleys for the construction and use of Switch as Carrier may demand, and shall also pay to Carrier the sum of Four Hundred and Twenty and no 100 ($420.00) Dollars, cost of work and material to be furnished by Carrier, and shall also furnish the following material and perform the following work in connection with construction of Switch:

Shipper's materials and work shall conform to Carrier's current requirements. Title to all metal materials in switch is reserved by Carrier and Shipper expressly disclaims owning same. Upon termination hereof, Carrier may remove its portion of switch. Remainder of switch, including all materials used in the construction thereof, is hereby declared to be personal property, and ownership thereof and title thereto, upon termination hereof, shall vest solely as follows:

In Carrier, its Successor and Assigns.

3. Shipper shall furnish all Cross and Switch Ties required for maintenance during term of agreement and Carrier will install.

4. Any other payments hereunder shall be made within ten (10) days following receipt of bill.

5. Carrier shall be saved harmless from any and all expenses and liability attendant on (1st) any readjustment required of Switch to conform to any change in grade or alignment of Carrier's tracks, or of any highway, or to meet any public need; (2nd) use of Switch being restricted or prevented by any governmental authority. Shipper shall prevent anyone, except Carrier, as well as refrain from placing or keeping any obstruction closer vertically than 25 feet to nearest rail of Switch, or closer horizontally than 8½ feet to center line of Switch. Carrier's knowledge of such obstructions and its continued operation on Switch shall not be a waiver of this covenant, nor of Carrier's right to recover for such damages to persons or property as may result therefrom Carrier at any time, may lengthen, extend or connect with Switch, and may use same when not to the detriment of Shipper.

6. It is understood that movement of railroad locomotives involves some risk of fire, and Shipper assumes all responsibility for and agrees to indemnify Carrier against loss or damage to property of Shipper or to property upon Shipper's premises, regardless of railroad negligence, arising from fire caused by locomotives operated by Carrier on Switch, or in its vicinity for purpose of serving Shipper, except dam-

ages to premises of Carrier and to rolling stock belonging to Carrier or to others, and to shipments in course of transportation. Shipper also agrees to indemnify and hold harmless Carrier from loss, damage or injury from any act or omission of Shipper, Shipper's employees or agents, to the person or property of the parties hereto and their employees and to the persons or property of any other person or corporation, while on or about Switch; and if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties hereto it shall be borne by them equally.

7. Shipper agrees (a) that without written consent of Carrier, Shipper will not direct or authorize the use of Switch by or for the benefit of any other party than the parties hereto; and (b) that all freight to be transported over Switch (the routing of which can be controlled by the Shipper) between points that can be reached by the line of Carrier, or that can be reached by a practicable route of which said line shall form a part shall be shipped over said line and route, and not otherwise, provided the freight rates shall be as favorable as they are by other routes between the same points.

8. Loaded cars and freight therein shall be considered as delivered to and in custody of Shipper from the time same are placed on Switch and such cars shall be considered as remaining in the custody of Shipper until unloaded and Carrier notified. Carrier may require written notice at non-agency stations. Cars unloaded by Shipper and retained for reloading shall be considered as remaining in Shipper's custody until outbound bill-of-lading is signed by Carrier. Empty cars will be considered in custody of Shipper from the

time placed on Switch until loaded and bill-of-lading is signed by Carrier.

9. This agreement, shall begin with the date hereof and continue thereafter until concluded by expiration of thirty days following serving by Carrier's subscribing officer on Shipper, or vice-versa, of written notice of intention to end said term, or at Carrier's election without notice, by Shipper failing for twenty days to cure any default after written notice thereof given by said officer. Notices hereunder shall be deemed served when deposited, duly stamped, in the U. S. Mail, addressed as aforesaid. Termination hereof shall not release any liability or obligation incurred hereunder.

10. Every undertaking herein shall have the effect of a covenant. Carrier's undertakings are limited to its express covenants herein. Covenants herein shall inure to the benefit of or bind each party's legal representatives, successors and assigns; but none of Shipper's rights is assignable either voluntarily or involuntarily. Either party may waive any default at any time of the other without affecting or impairing any rights arising from any subsequent default. No subscribing officer's subordinate is empowered to vary any covenant herein. Shipper's covenants herein are joint, several and in solido.

IN TESTIMONY WHEREOF, the parties hereto have executed this agreement the day and year first above written.

LOUISIANA & ARKANSAS RAILWAY COMPANY

By: /s/ Carl Sippel,
Assistant to President.
(As Carrier, Party of First Part)

GRAYDON ANTHONY LUMBER COMPANY

By: /s/ J. W. Anthony

By: /s/ Graydon Anthony
(As Shipper, Party of the Second Part)